Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-859

In The

Supreme Court of the United States

October Term, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, et al.,

Petitioners,

v.

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FLORIDA LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF FLORIDA LEGAL FOUNDATION AND SOUTHEASTERN LEGAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Florida Legal Foundation and Southeastern Legal Foundation submit their brief as amici curiae in support of Respondents. In accordance with Supreme Court Rule 37.2, this brief is accompanied by the written consent of the parties, evidenced by letters that have been filed with the Clerk of the Court.

The Florida Legal Foundation is a nonprofit corporation established to promote the public interest in balancing private property rights and public needs for the benefit of all citizens. Recognizing that the adversarial process can function properly only when all parties are afforded effective representation, the Foundation seeks to assure, through advocacy within the legal system, that the rights of Florida property owners are fairly considered and adequately defended against unreasonable restriction or deprivation due to the exercise of governmental power. A primary purpose of the Foundation is to provide legal support for landowners who are disadvantaged in defending their interests, particularly in cases where government agencies or environmental groups possessing superior resources are promoting principles of law that might establish a precedent adversely affecting the property rights of others.

The Southeastern Legal Foundation is a public interest law firm which provides the courts with the views of those who support limited government, individual economic freedom, and the free enterprise system. Southeastern's function is to engage in litigation in support of these principles, and to oppose governmental abuse of authority at all levels. In the course of carrying out this mission, Southeastern provides direct legal representation to parties in civil litigation, and files amicus curiae briefs in selected cases, where important public policy issues are presented. Southeastern appeared as counsel of record in this Court for the petitioner in *Northeastern Florida Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993), and has appeared as amicus curiae in numerous cases, including *Lucas v. South Carolina Coastal Council*, 505 U.S.

___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), and *Dolan v. City of Tigard*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 304 (1994).

As advocates for private property rights, the Florida Legal Foundation and Southeastern Legal Foundation are interested in this case because the regulation at issue substantially impairs the rights of landowners to use their property for productive and otherwise lawful purposes. The impact of the regulation is particularly severe in Florida, which has more endangered and threatened species than any state in the continental United States except California. The Florida Legal Foundation and Southeastern Legal Foundation believe that the court of appeals' decision properly invalidated the regulation as an unauthorized extension of the limited power to control private land use that Congress intended to confer under the Endangered Species Act. This case provides the Court an opportunity to reaffirm its recent pronouncements that government regulations which encroach upon constitutionally protected property rights warrant close scrutiny and require clear support.

STATEMENT OF THE CASE

Amici Florida Legal Foundation and Southeastern Legal Foundation adopt the statement of the case contained in the brief of the Respondents.

SUMMARY OF THE ARGUMENT

To the extent that it prohibits the ordinary and lawful use of private property as a "habitat modification" that causes "harm," and thus constitutes a "take" of protected wildlife, the FWS regulation exceeds the authority delegated by Congress under the ESA. The language and structure of the Act reflect that Congress expressly provided for habitat preservation in the sections that authorized acquisition of private lands and required regulation of lands subject to federal ownership or oversight, but made no mention of habitat protection in the section prohibiting a "take" of listed species. Based on the traditional tools of statutory construction, which must be applied before resorting to extrinsic aids such as legislative history or administrative interpretation, the express reference to habitat modification in some sections but not others signifies a purposeful intent to regulate such activities on federally controlled lands, including private lands subject to federal permitting, but not on purely private property.

Given the fact that the "revealed design" of Congress is evident from the explicit terms of the statute, there is no necessity or justification for reaching policy questions or considering the reasonableness of the agency's interpretation. Nonetheless, the court of appeals' construction is supported by the distinction, presumably known to Congress, between the common law power of government to prohibit direct acts of force against wildlife as an offense against public property, and the constitutional restraint on the power of government to take private property without compensation by regulatory deprivation of use. Consistent with that distinction, Congress

reasonably and responsibly exercised its regulatory power under the ESA only to the extent that it could do so without "going too far" and forcing private landowners to bear the public burden of providing habitat for wildlife.

The FWS regulation, however, crosses that line by mandating habitat preservation on private lands under threat of fine or imprisonment; it thereby transforms the ESA into a land use regulation that subjects the government to potential liability for Fifth Amendment takings of private property. Moreover, the regulation is especially oppressive for small landowners, who have no practical remedy because they lack the resources or the bargaining power to do anything except capitulate to whatever terms are dictated by the FWS. The manifest undesirability of such consequences confirms that this regulation extends the scope of the ESA far beyond the limits contemplated by Congress.

ARGUMENT

I. THE REGULATION DEFINING "HARM," AS USED IN THE ENDANGERED SPECIES ACT PROHIBITION AGAINST A "TAKE" OF WILDLIFE, TO INCLUDE HABITAT MODIFICATION ON PRIVATE PROPERTY NOT SUBJECT TO FEDERAL OVERSIGHT, IS CONTRARY TO THE INTENT OF CONGRESS AS REFLECTED IN THE LANGUAGE AND STRUCTURE OF THE ACT.

The sole question presented here is whether the Endangered Species Act ("ESA"), 16 U.S.C. §§1531 et seq.,

by describing the kinds of conduct prohibited as a "take" of wildlife to encompass acts that "harm" listed species, provides authority for a Fish and Wildlife Service ("FWS") regulation, 50 C.F.R. 17.3, further defining "harm" to include habitat modification that may result from otherwise lawful uses of private property. Although Petitioners and their supporting amici attempt to cast this controversy as one that poses a choice between competing policies, the Florida Legal Foundation and Southeastern Legal Foundation submit that the Court is confronted with nothing more than a straightforward issue of statutory construction. Thus, efforts to influence the resolution of this case based on the purported necessity or desirability of the disputed regulation should not obscure the fact that, in assessing the validity of a regulation, it is not the function of this Court to search for some rationale that would justify acquiescence in the agency's interpretation; rather, it is the duty of the Court to determine whether Congress intended or contemplated that the agency be empowered to exercise the asserted authority. *Presley v. Etowah County Commission*, 502 U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51, 67 (1992).

When an agency's construction of a statute it administers is challenged, the Court must first endeavor to discern the intent of Congress from the language and structure of the Act. "If a Court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Where intent can be determined from the face of the statute, there is no need to resort to

extrinsic aids, such as legislative history, *Ratzlaf v. United States*, 510 U.S. ___, 114 S.Ct. ___, 126 L.Ed.2d 615, 626 and n.18 (1994), or administrative construction. *Estate of Cowart v. Nicklos Drilling*, 505 U.S. ___, 112 S.Ct. 2589, 120 L.Ed.2d 379, 388-89 (1992); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-48 (1987). Only if Congress has not addressed the issue and the statute discloses no intent, thus creating an ambiguity or leaving "a gap for the agency to fill," will the Court reach the question of whether the regulation constitutes a permissible and reasonable construction to which deference is due. *Chevron*, 467 U.S. at 843-44.

Where, as here, the regulation does not involve a technically complex matter, but inherently infringes upon constitutionally protected property rights, the Court should not infer an intent to delegate authority from mere silence, nor assume an intent to confer authority from the absence of language expressly negating its existence. Rather, the Court should require that the statute on its face reflect an affirmative intent to authorize the extension of federal power.

Turning first to the express language, the word "harm" is not defined in the ESA. Although the term can be interpreted as expansively as the imagination permits, its meaning in this context must properly be confined to the kind of harm that can fairly be regarded as a prohibited "take" of wildlife, which Congress intended to make punishable by fine or imprisonment. The meaning of statutory terms "depends on their context," *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 (1988), especially when the context "may supply a clarity that the term

lacks in isolation." *Department of Energy v. Ohio*, 503 U.S. ___, 112 S.Ct. ___, 118 L.Ed.2d 255, 270 (1992).

The court of appeals, applying the maxim *noscitur a sociis*, adopted a definition that related "harm" to the other specified forms of "take" based on "a direct application of force against the animal taken." 17 F.3d at 1465. Petitioners contend that this definition is too narrow, because it does not encompass actions that indirectly injure or kill. Amici National Wildlife Federation ("NWF") et al. suggest that the "common denominator" among the words in the "take" definition is that "[e]ach word pertains to acts (or omissions) that detrimentally affect endangered or threatened species," and thus "[t]he detrimental effect, rather than the nature of the act, is the linchpin of a section 9 take." NWF Brief at 23. This definition, however, is manifestly overbroad, because virtually all human activity entails some "detrimental effect" on wildlife.

Any effort to formulate a definition of "harm" that cannot be condemned as either overinclusive or underinclusive may be an exercise in futility; but it is an exercise that the Court need not undertake for purposes of deciding this case. The issue is not whether it is possible to frame a definition of "harm" that will neatly fit every hypothetical situation, but whether the definition promulgated by FWS in the regulation at issue here goes beyond the authority that Congress intended to delegate under the ESA. Assuming, arguendo, that the court of appeals' construction based on associated words within the same section was not sufficiently conclusive on that question, the next stage of analysis requires the Court to

examine other sections of the ESA for guidance as to the legislative intent.

The Act reflects that Congress expressly provided means for habitat preservation in section 5 (acquisition of private lands) and in section 7 (supervision of federal lands and other lands subject to federal oversight), but made no mention of habitat protection in the section 9 "take" prohibition. Although Petitioners insist that the Court should ascribe no significance to this selective use of language in the various sections of the Act, application of the "traditional tools of statutory construction" reinforces the conclusion that Congress did not intend to employ the punitive "take" provision of section 9 as a mechanism for compelling private habitat conservation.

In construing legislative enactments, the Court customarily "follow[s] the cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context," *King v. St. Vincent's Hospital*, 502 U.S. ___, 112 S.Ct. ___, 116 L.Ed.2d 578, 586 (1991) (citations omitted), and the Court's "duty is to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation." *Achilli v. United States*, 353 U.S. 373, 379 (1957). Of particular relevance here are the rules, consistently reaffirmed by this Court, that (a) where Congress " 'includes particular language in one section of a statute but omits it in another,' " it " 'is generally presumed that Congress acts intentionally and purposely,' " *Chicago v. Environmental Defense Fund*, 511 U.S. ___, 114 S.Ct. ___, 128 L.Ed.2d 302, 311 (1994) (quoting *Keene v. United States*, 508 U.S. ___, 113 S.Ct. 2035, 124 L.Ed.2d 118, 128 (1993)); and (b) the use of different wording in other sections of the same

statute shows that Congress knew how to signify its intent to draw a distinction in addressing the subject. *Melkonyan v. Sullivan*, 501 U.S. ___, 111 S.Ct. ___, 115 L.Ed.2d 78, 89-90 (1991).

Considered in light of these principles, the fact that Congress explicitly provided for habitat preservation on lands that are federally owned or subject to federal oversight in another section of the same enactment shows that Congress recognized habitat modification as a distinct kind of conduct toward wildlife, and knew how to express an intent that it be subjected to regulation; because of the specific inclusion in section 7, the omission from section 9 is entitled to interpretative significance. Amici NWF et al. argue that it is a "misreading" of the Act to "assume that section 7 reaches habitat degradation but that section 9 does not." NWF Brief at 25. Based on the plain language of these provisions, however, it is hardly possible to do otherwise, because section 7 expressly refers to "the destruction or adverse modification of habitat," while section 9 contains no mention of habitat modification.

Petitioners acknowledge that to achieve the purposes of providing for conservation of ecosystems upon which protected species depend, "the Act contains numerous provisions that specifically address, in varying ways, the protection of habitat." Petitioners' Brief at 24. Having conceded that fact, however, Petitioners invite the Court to bypass the explicit provisions for habitat protection and *imply* an unarticulated Congressional intent to include habitat modification by private landowners as a form of prohibited "take" under section 9. This approach

turns the traditional principles of statutory construction on their head.

Specifically, Petitioners dispute the "suggestion that Congress intended land acquisition pursuant to Section 5 of the ESA to be the exclusive means by which habitat destruction on private lands can be curbed under the ESA," and insist that "[i]t would depart from the ESA's comprehensive design to assume that Congress . . . provided only a single solution to a complex problem – especially one as central to the Act as the habitat of protected species." Petitioners' Brief at 29 n.17. Analysis reveals, however, that it is Petitioners' argument that rests on assumptions which cannot be reconciled with the "comprehensive design" of the ESA.

The first unfounded assumption is that land acquisition under section 5 is the exclusive means by which habitat modification on private land may be regulated pursuant to the Act. As Petitioners themselves concede, the obligation imposed on federal agencies by section 7(a)(2) to ensure that "any action authorized, funded, or carried out by such agency" does not "result in the destruction or adverse modification of habitat of [protected] species" is applicable to activities on private lands that require a federal permit or license. Petitioners' Brief at 7-8. This provision extends the reach of federal regulatory power to encompass and control habitat modification on vast areas of private land that involve projects or uses subject to federal permitting.

Moreover, Petitioners' theory assumes that Congress intended to authorize the purchase of land as an optional method of preserving habitat on private property, even

though the same result could be obtained without payment. Under Petitioners' interpretation of the ESA, section 5 empowers the FWS to create a habitat preserve on private land by paying the owner, while section 9 empowers the FWS to create a habitat preserve on private land by threatening to penalize the owner. At best, such a scheme would invite arbitrary discrimination by enabling the FWS to treat identically situated persons differently, without any apparent standard or basis in the statute for determining which landowners enjoy compensation and which ones suffer confiscation. In the case of a small landowner who lacks the resources to resist or the bargaining power to negotiate a satisfactory compromise, the acquisition option would be rendered illusory, because the FWS would have no incentive to acquire by compensation what it can control by intimidation.

Finally, the notion that Congress would not have provided "only a single solution to a complex problem" ignores the fact that government frequently does not address every aspect of an issue or adopt every solution to a problem, and is not required to do so. As this Court has observed, the government is "not bound . . . to strike at all evils at the same time or in the same way," *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935), and "it is not within our province to say that because Congress has prohibited some practices within its power to prohibit, it must prohibit all within its power." *United States v. Petrillo*, 332 U.S. 1, 8 (1947). In this case, the expressed intent of Congress to confine federally mandated habitat preservation on private property to those lands that the government acquires or

already controls may simply reflect the fact that Congress, unlike Petitioners and their supporting amici, respect the constitutionally protected property rights of private landowners.

Because the intent of Congress is evident from the language and structure of the ESA, there is no need to reach the second step of the *Chevron* analysis and consider whether the agency's interpretation, construing the word "harm" to include habitat modification, "defines a term in a way that is reasonable in light of the legislature's revealed design." *Chevron*, 467 U.S. at 844. The FWS definition of "harm" is plainly irreconcilable with the "revealed design" of Congress in the ESA.

Petitioners and their supporting amici nonetheless urge the Court to look beyond the language and structure of the ESA, and uphold the regulation on the ground that it is a wise and desirable policy. They repeatedly emphasize that a stated purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," 16 U.S.C. §1531(b), and that Congress expressly intended the word "take" as used in section 9 to be defined "in the broadest possible manner to include every conceivable way in which a person can 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong. 1st Sess. 7 (1973). Those arguments, however, may be readily refuted.

Initially, it is apparent from the face of the ESA that Congress did in fact provide specific means by which ecosystems could be protected and preserved – through the acquisition of land under section 5 and the regulation

of land use under section 7. While Petitioners and their supporting amici may perceive those means as inadequate, the more potent remedy that they implore this Court to approve would require nothing less than a judicial redrafting of the statute; thus, their pleas are misdirected. "It was for Congress to make the choice of the means by which its objective . . . was to be secured, and its judgment . . . is not open to review here." *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 553 (1937).

Furthermore, no one other than Petitioners and their supporting amici would find "conceivable" a scheme under which a private property owner, engaged in ordinary and lawful land uses that are in no way directed at wildlife, could be regarded as guilty of "taking" protected species whose presence may not even be apparent.[1] Amici NWF et al. recognize that "even without the

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[1] Some listed species are so small in size, or so well concealed, or so similar in appearance to related but non-listed species, that ordinary persons cannot detect their presence. The more oppressive impact on private landowners, however, results from the designation of an expansive "range" within which land use activities are forbidden or severely restricted. For example, a study of Florida panther habitat conducted by the FWS, the National Park Service, and the Florida Game & Fresh Water Fish Commission concluded that the "composite home range of 43 panthers encompasses 3.1 million acres or 4,844 square miles," of which "53 percent is privately owned"; that "habitat considered essential in maintaining a self-sustaining population of panthers in south Florida is 1,253,102 acres"; and that the "preferred size" of habitat area required for reintroduction of the animal in north Florida and south Georgia is 500-2,500 square miles. P. Logan, et al., Florida Panther Habitat Preservation Plan 12, 14, 33 (Florida Panther Interagency

harm regulation, the words 'harass,' 'kill,' and 'wound' reach some acts of habitat degradation that injure or kill protected wildlife." NWF Brief at 25. That fact only confirms that the kinds of habitat modification which result directly or by design in demonstrable injury or death are already encompassed within the statutory prohibition, and that the further extension of the ESA's scope by this broad regulation exceeds the authority contemplated by Congress.

Conceding that habitat loss poses the greatest threat to species, and that Congress through the ESA intended to provide a means for conserving ecosystems, it does not necessarily follow that Congress authorized a means other than those expressly provided in section 5 and section 7 for purchasing private lands and regulating federally owned or supervised lands. The question is not whether Congress understood that the preservation of habitat is the most effective or expedient means of protecting listed species; the question is whether Congress intended to authorize the federal government to enforce compulsory preservation of habitat on purely private property under threat of fine and imprisonment. Because

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Committee, 1994). In the case of species such as the northern spotted owl and the red cockaded woodpecker, a "buffer zone" is established around active colonies. See *Sierra Club v. Yeutter*, 926 F.2d 429, 432-33 (5th Cir. 1991); see also *Florida Game & Fresh Water Fish Comm'n v. Flotilla, Inc.*, 636 So.2d 761, 763-65 (Fla. 2d DCA), *rev. denied*, 645 So.2d 452 (Fla. 1994) (development halted in "zone of preservation" surrounding eagles' nests). Where such buffer zones overlap property boundaries, neighboring owners are subject to prosecution for land use activities even though the listed species is not, and may never have been, actually present on their property.

the Act on its face refutes any such construction, the court of appeals' decision should be affirmed.

II. THE REGULATION DEFINING "HARM" TO INCLUDE HABITAT MODIFICATION EXTENDS THE ESA BEYOND THE SCOPE THAT CONGRESS INTENDED BY TRANSFORMING THE ACT INTO AN INSTRUMENT FOR DENYING THE USE OF PRIVATE LAND, THEREBY SUBJECTING THE FEDERAL GOVERNMENT TO POTENTIAL LIABILITY FOR FIFTH AMENDMENT TAKINGS CLAIMS.

The foregoing analysis demonstrates that the language and structure of the ESA evince a clear Congressional intent to provide for habitat preservation on lands that the federal government owns, or has independent authority to regulate, or is willing to purchase; but nothing in the Act supports a prohibition against habitat modification as such on private property. Petitioners nonetheless insist that "[t]here is no reason why Congress would have intended to allow the killing or injury of protected wildlife where that consequence is brought about by the destruction of habitat . . . rather than by other means, such as the discharge of a firearm or similarly direct application of force. . . . " Petitioners' Brief at 21. Because habitat destruction that is *deliberately intended* to kill or injure wildlife can be characterized as a prohibited "take" based on other terms within the statutory definition, such as "kill" or "wound," the critical question posed by Petitioners must be stated more precisely as whether there is any reason why Congress would treat lawful land use activities by private property owners that

indirectly and unintentionally produce detrimental effects on wildlife differently from direct attacks.

The Florida Legal Foundation and Southeastern Legal Foundation submit that there is in fact a legally and logically sound reason why Congress, while prohibiting direct acts of force against protected species, would refrain from imposing penalties on private landowners for engaging in otherwise lawful land uses that may incidentally impair the behavioral patterns of wildlife. Analysis reveals that this limitation on the exercise of federal regulatory authority rests upon a distinction that is rooted in the Constitution and the common law.

At the outset, it merits emphasis that the kinds of acts characterized as "habitat modification or degradation" amount to nothing more than ordinary land uses, many of which are essential to the feeding and sheltering of the *human* species. Such land uses, unless otherwise prohibited by law, are within the constitutionally protected "bundle" of private property rights that the Fifth Amendment forbids the government from taking for public use without compensation, whether the confiscatory effect results from physical occupation or from an equivalent deprivation of use by the exercise of regulatory authority. See *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798, 812-15, 820-22 (1992). Government regulations that deny landowners the economically viable use of their property, even if only temporarily and for a proper purpose, may constitute a compensable taking. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-19 (1987).

By contrast, the discharge of a firearm or other "direct application of force" against wildlife is not a constitutionally protected activity, because it is settled as a matter of common law that wild animals are public property, which government has the power to protect.

> The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use, and property rights that may be acquired therein.

Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924). Based on this principle, federal legislation that prohibits landowners from killing or injuring protected wildlife, even when necessary to prevent depredation of livestock or other damage to private property, has been upheld against claims that such regulation effects a compensable taking under the Fifth Amendment. See *Christy v. Hodel*, 857 F.2d 1324, 1334-35 (9th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989) (no liability under ESA for depredation of sheep by grizzly bears); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1426-31 (10th Cir. 1986), *cert. denied*, 480 U.S. 951 (1987) (no liability under Wild Free-Roaming Horses and Burros Act for consumption of forage by wild horses).[2]

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[2] Not surprisingly, the states are eagerly following the federal lead on the strength of these authorities. For example, one state has extended the principle to deny compensation where a private landowner's fenced pastures were invaded and permanently occupied by a herd of tule elk that had been deliberately

Considered in light of these principles, the limitations defined by the language and structure of the ESA are not only understandable, but laudable. In drafting the ESA, Congress presumably acted with knowledge of the power conferred by common law to prohibit direct acts of violence against wildlife, as well as the constitutional restraint on its authority to regulate private land use. Thus, Congress could reasonably and responsibly have made a conscious decision to exercise its regulatory power to the extent – but only to the extent – that it could do so without "going too far," and thereby subjecting the federal government to potential liability for compensable takings of private property.

Insofar as section 9 of the ESA is construed to prohibit "harm" by deliberate and direct acts against protected wildlife, its application is consistent with decisions that recognize such conduct as a punishable offense against public property. By interpreting "harm" to include habitat modification, however, the FWS regulation effectively imposes a burden on the landowner to provide food, shelter, and breeding grounds for "public" wildlife. This Court certainly should not assume that Congress intended what the Constitution does not allow – "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

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transported to the area under a state relocation program, which specifically contemplated that the animals would forage on private farms and ranch lands. *Moerman v. State of California*, 17 Cal.App.4th 452, 21 Cal.Rptr.2d 329 (1st Dist. 1993), *cert. denied*, ___, U.S. ___, ___ S.Ct. ___, 128 L.Ed.2d 191 (1994).

public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

That the prohibition against habitat modification by private landowners effectively transforms the Act into a pervasive land use regulation cannot be disputed. As recognized by Judge Williams, speaking for the panel majority upon the denial of rehearing en banc, the expansion of the word "harm" to include habitat modification "vests the Department with authority to supervise the use of privately owned land in vast tracts of the United States, even to the point of forbidding modest clearing efforts conducted in the interest of fire protection in populated areas." 30 F.3d at 193.[3] Even amici NWF et al. concede that "[m]any conservation plan restrictions on private land use operate in much the same way as zoning laws," while "[o]ther provisions are analogous to common land use regulations. . . . " NWF Brief at 28.

Petitioners and their supporting amici predictably dismiss or downplay the idea that a prohibition against habitat modification represents a significant impairment

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[3] Evidence supporting Judge Williams' observation is provided in a General Accounting Office report, which reflects that the 31 Habitat Conservation Plans approved by the FWS through June 1994 encompass a total area of more than 1.3 million acres. An additional 132 plans were being developed or awaiting approval. Of the 31 approved plans, four cover the habitat of the Stephens' kangaroo rat in Riverside County, California (including one with an area of 300,000 acres); two others cover the habitat of the northern spotted owl (including one with an area of 383,100 acres). U.S. General Accounting Office, *Endangered Species Act: Information On Species Protection On Nonfederal Lands* 9, 18-20 (December 1994) ("GAO Report"). See also *supra* note 2.

of landowners' rights. In particular, amici NWF et al. assert that "no court has ever found that the harm regulation has caused a Fifth Amendment taking of private property," and that no individual has ever been imprisoned for normal land management activities under the harm regulation. NWF Brief at 14-16 and n.13. Amici NWF et al. further declare that "because species rarely need totally undisturbed habitat, such modifications [of private land use activities] are generally quite modest, . . . enabling private and governmental land uses to proceed apace." NWF Brief at 27. They conclude that "[t]he harm regulation, therefore, does not operate to foreclose private or public land uses." *Id.*

Any suggestion that the FWS regulation prohibiting habitat modification does not significantly inhibit the rights of private landowners to use their property for lawful purposes is sheer sophistry. The fact that enforcement of the regulation has not yet resulted in a compensation award does not mean that Congress intended to authorize the measure; and it certainly does not mean that there has been no serious deprivation of the landowners' rights. It simply means that the FWS has thus far managed to evade liability – a relatively simple matter in light of the prevailing standard for regulatory takings, which effectively forecloses relief under the Fifth Amendment if the regulation leaves a landowner with some economically viable or beneficial use of the property. *Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

As acknowledged by amicus Friends of Animals, Inc. ("FAI"), "[r]ealistically . . . a 'taking' here would be difficult to establish, since it appears that Respondents'

property has not been the subject of a *total* regulatory taking, depriving Respondents of the *complete* economically viable use of their land." FAI Brief at 9 (emphasis added). This principle, which creates what the Court has appropriately characterized as an "all-or-nothing" situation,[4] enables the FWS to avoid liability for a takings claim by carefully tailoring the application of its prohibition against habitat modification to assure that the landowner is never deprived of all economically beneficial use of the entire property. There are encouraging indications, however, that the "all-or-nothing" rule may be giving way to a more fair and reasonable approach – one that recognizes a right to proportionate compensation for partial takings – both in the courts, see *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1568-71 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 130 L.Ed.2d 783 (1995), and in Congress. See S. 2410 and H. 9, 103d Cong. 2d Sess. (1995). Thus, the likelihood that liability may be imposed for a taking of private property due to the operation of the "harm" regulation – a liability that the FWS will have incurred for an exercise of authority that Congress never conferred – is no longer a remote prospect.

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[4] *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798, 815 n.8 (1992). Although the Court noted that an owner "whose deprivation is one step short of complete" only loses the benefit of the categorical rule, and may still seek compensation by attempting to establish an interference with investment-backed expectations, the complexity, expense, and extraordinary burden of proof that such a proceeding entails will typically present an insurmountable obstacle for small landowners.

Finally, Petitioners argue that "the Section 10 permit program adds flexibility to the 'take' prohibition by enabling private owners' land uses to be accommodated in a way that protects listed species," and that invalidating the application of section 9 to private habitat modification "would upset the careful balance intended by Congress among the many competing interests of private landowners, governmental entities, and the purposes of the ESA." Petitioners' Brief at 49. The notion that habitat conservation plans under section 10 afford a useful mechanism for balancing the regulatory objectives of the FWS with the rights of private landowners is utterly fanciful. Because the process required to prepare, submit, and secure approval for a habitat conservation plan is so costly and time consuming, the section 10 permit program is simply not a viable option for most landowners.[5]

As a practical matter, small landowners have no remedy for the taking of their property by application of the habitat modification ban. When confronted with demands by an agency of the federal government – often supported by state counterparts – that a portion of their property must be preserved for the benefit of protected wildlife, coupled with the threat of fine or imprisonment for failure to comply, ordinary landowners have little or no choice. Caught between the daunting prospect of severe penalties for disobedience and the prohibitive

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[5] Experience bears out this fact. Of the 31 HCPs approved through June 1994, only three involved parcels of less than ten acres, while twice that many covered areas of more than 10,000 acres. See GAO Report, *supra* note 4, at 18-20.

expense of litigation, the landowner is obliged to capitulate. Under these circumstances, whatever terms or conditions are dictated by the FWS will constitute, quite literally, an offer that the landowner cannot refuse. That Congress could have intended such consequences is manifestly inconceivable.

CONCLUSION

The foregoing arguments and authorities demonstrate that the FWS regulation, by compelling habitat preservation on private land under the guise of preventing a "take" of wildlife, not only exceeds the authority delegated by the express terms of the ESA, but entails practical consequences never contemplated by Congress. Although great deference has been accorded to the FWS in the implementation of the ESA since its enactment more than two decades ago, neither Congress nor the courts anticipated that the agency would effectively transform the Act into a land use regulation. By arresting this unauthorized expansion of power, the court of appeals properly restored the ESA to the role that it was intended to fulfill.

Accordingly, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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March, 1995